DATE: December 16, 1997

CASE NO: 95-INA-368

In the Matter of

DAVID HAMBERGER INC.
Employer

on behalf of

HENRY DE JESUS CHAVARRIAGA
Alien

Appearances: Law Offices of S. Bernard Schwarz by
S. Bernard Schwarz, Esq. for Employer and Alien

Before: Guill, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from David Hamberger Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On October 13, 1987, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the State of New York Department of Labor ("NYDOL") on behalf of the Alien, Henry De Jesus Chavarriaga (AF 13-16). The job opportunity was listed as "Mold Maker". The job duties were described as follows:

> Design, shape and make molds for casting latex and urethane objects for decorative display items. Shape mold in plaster or plastic which is then covered with sheet metal to produce final mold form in metal foundry. Use clay, plaster, ceramic and liquid rubber, and several sculpture tools. Mold types include figurines and other decorative and ornamental objects.

(AF 16).

The stated job requirements for the position, as set forth on the application, are as follows: 6 months experience in the job offered or 1 year in any mold making in similar consumer type product (AF 16).

On October 12, 1989, NYDOL notified the Employer to amend the wage offer to the

prevailing wage (AF 19-20). In response, on November 22, 1989 the Employer amended the job to a "Mold Maker Assistant" position (AF 21, 56).

The CO issued a Notice of Findings ("NOF") on July 23, 1990 proposing to deny the certification because the Employer's wage offer did not equal or exceed the prevailing wage in violation of Section 656.20(c)(2) (AF 36-37). The Employer submitted its rebuttal on August 24, 1990 (AF 38-63). The CO issued a Final Determination ("FD") on September 21, 1990 denying certification based on the Employer's failure to offer the prevailing wage (AF 64-65). The Employer filed a Request for Reconsideration which was denied (AF 67-69, 71). A Request for Review was filed on September 26, 1990 (AF 88). On February 1, 1993 the Board remanded the case back to the CO with instructions to provide the wage survey to the Employer so that he could rebut the wage survey results. David Hamberger, Inc. 91-INA-103 (Feb. 1, 1993); (AF 109-112).

The CO issued a second NOF on July 18, 1994 proposing to deny certification on three separate grounds (AF 211-215). First, the CO found that the requirement of 6 months in the job duties or 1 year of "any mold making in similar consumer type product" exceeded the specific vocational preparation ("SVP") for a "Plaster Molder II" position in violation of Section 656.21(b)(2). Second, the CO found that the Employer rejected two qualified U.S. applicants for other than lawful job-related reasons in violation of Section 656.21(b)(6). And third, in violation of Section 656.21(b)(5), the CO found that:

> "If employer continues to indicate that experience questioned (with latex products is [sic] seems) is required for the performance of the job, it is not clear that the alien had this experience prior to his employment with this employer. The employer apparently accepted the alien for this employment without experience in "latex" mold making ..."

(AF 211).

The Employer submitted its rebuttal on August 22, 1994. It consisted of a cover letter by the Employer's attorney and three letters from the Employer (AF 216-230).

On September 7, 1994, the CO issued a Final Determination ("FD") which denied certification (AF 234). The CO found that: 1) the job requirements were excessive; 2) U.S.

applicants were not rejected for lawful job-related reasons; and 3) the Employer failed to document that its requirements for the job opportunity are the minimum necessary for the performance of the job and that it has not hired nor is it feasible for it to hire workers with less training and/or experience (AF 231-234).

On September 29, 1994, the Employer filed a Request for Reconsideration (AF 245). The CO denied the Request for Reconsideration on November 9, 1994 (AF 246). The Employer filed a Request for Review (AF 245).

Discussion

The NOF found that the alien's experience for the offered position came from his work at the Employer. The CO provided the Employer with the following four options to cure the deficiency: 1) Submit evidence which clearly shows that the alien at the time of hire had the qualifications which the Employer is now requiring; 2) Make clear that the requirements do not include that which the alien lacked at the time of hire; 3) Document why it is not feasible for the Employer to accept a U.S. worker under similar experience terms extended to the alien when hired; or 4) Amend the job requirements so that experience with latex products is no longer required (AF 211).

Section 656.21(b)(5) provides that:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

Labor certification will be denied under this section when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position. Johnson, Johnson & Roy, Inc., 94-INA-

504 (Jul. 31, 1996).

We agree with the analysis of the Certifying Officer. The alien had worked for the Employer for over 2 years at the time of the application for certification. The alien's job description at the Employer and the job description for the position in question are exactly the same (AF 13, 16). The alien's job experience in metal molding prior to working for the Employer is comparable to the metal molding experience of the two rejected U.S. applicants - Yury Shtifman and Reginald Fontaine (AF 13, 185-187, 192-193, 220). Since the Employer has rejected the non-latex experience of the two U.S. applicants, it cannot claim that the alien's qualifying experience is from his non-latex mold making experience.

The Employer's rebuttal failed to adequately address any of the options to cure the deficiency. First, the Employer states that "an experienced mould [sic] maker is essential to our manufacturing process ... By not allowing this man to keep his job you are jeapordizing [sic] forty seven American jobs in our factory." (AF 221). The Employer failed to offer any supporting documentation for this statement. A bare statement of infeasibility is inadequate to establish that an employer cannot now hire workers with less experience and provide training. MMMATS, Inc., 87-INA-540 (Nov. 24, 1987). Second, while the Employer states that the alien is qualified for the position, it failed to address where the alien acquired the skills for the position (AF 219). Certification is properly denied when the Employer fails to respond to the CO's inquiry as to where the alien had obtained his qualifying experience. Tecnomatix, Inc., 90-INA-510 (Jan. 31, 1992).

The Employer's argument that the denial of certification was improper since the issues in the second NOF were not previously raised by the state agency, nor by the CO in the first NOF, also lacks merit (AF 229-230). First, it is well settled that the CO is not bound by the decisions of the local employment service. Peking Gourmet, 88-INA-323 (May 11, 1989); Aeronautical Marketing Corp., 88-INA-143 (Aug. 4, 1988). Second, while a CO cannot raise an issue for the first time in the FD (Marathon Hosiery Co., Inc., 88-INA-420 (May 4, 1989) (en banc), there is no authority for the proposition that the CO must raise all issues in the initial NOF. The second

NOF gave the Employer the opportunity to rebut all of the disputed issues.

We find that the CO properly denied certification because the Employer failed to establish that it has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the Employer's job offer. Since we find that the Employer has not complied with Section 656.21(b)(5), it is not necessary to consider the other issues presented.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

_____

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California